

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KIRK AND AMY HENRY,

Plaintiffs,

vs.

FREDRICK RIZZOLO, aka RICK RIZZOLO, *et al.*,

Defendants.

Case No. 2:08-cv-00635-PMP-GWF

ORDER

**Motion for Rule 37(b) Sanctions –
#371**

This matter is before the Court on Plaintiffs' Motion for Rule 37(b) Sanctions for Defendant Rick Rizzolo's Failure to Comply With Order (#371), filed on May 11, 2010; Defendant's Opposition to Plaintiffs' Motion for Rule 37(b) Sanctions for Failure to Comply With Order (#389), filed on June 2, 2010; and Plaintiffs' Reply in Support of Motion for Rule 37(b) Sanctions (#397), filed on June 8, 2010. The Court conducted a hearing in this matter on June 14, 2010. At the conclusion of that hearing, the Court directed counsel to supplement the record with the depositions and documents referenced in the attorneys' arguments. Plaintiffs filed their Supplement to the Motion for Sanctions (#404) on June 21, 2010. Defendant filed supplemental discovery responses both before and after the hearing. *See* Docket Nos. 379, 394, 398, 406, and 416.

BACKGROUND

Plaintiffs Kirk and Amy Henry filed an underlying Nevada district court lawsuit against Frederick Rizzolo, aka Rick Rizzolo, and the Power Company, Inc., d/b/a The Crazy Horse Too in October 2001 to recover damages for severe bodily injuries that Kirk Henry sustained on September 20, 2001 when he was allegedly assaulted and battered by agents of Mr. Rizzolo and the

1 Crazy Horse Too. The Henrys subsequently entered into a \$10 million settlement with Rick
2 Rizzolo and the Power Company in July 2006. The settlement agreement provided for an initial
3 payment of \$1 million and that the \$9 million balance would be paid from the proceeds of the sale
4 of the Crazy Horse Too nightclub which was seized by the Federal Government. The initial
5 payment of \$1 million was made to the Henrys. The City of Las Vegas subsequently revoked the
6 business and liquor licenses of the Crazy Horse Too, however, and the nightclub has not yet been
7 sold. Accordingly, the Henrys have not received the \$9 million balance owed under the settlement
8 agreement.

9 In this action, Plaintiffs allege that Defendants Rick and Lisa Rizzolo engaged in fraudulent
10 transfers of their community assets in an attempt to shield them from Plaintiffs' claim. Plaintiffs
11 allege that shortly after the Henrys filed the underlying suit in October 2001, Rick and Lisa Rizzolo
12 formed a "so-called 'family trust'" to which they transferred their assets. *Complaint (#1)*, ¶ 13.
13 Plaintiffs further allege that the Rizzolos entered into a sham 2005 divorce decree which awarded
14 Lisa Rizzolo "nearly every listed community asset" except for the Crazy Horse Too which
15 Defendants knew would be subject to forfeiture to the Government. *Id.*, ¶ 15. Rick Rizzolo also
16 agreed to pay Lisa Rizzolo \$5 million in alimony, secured by his interest in the Crazy Horse Too,
17 with the knowledge that he would default on this obligation and thereby further diminish the assets
18 that would be available to pay damages to the Henrys. *Id.*, ¶ 17. Plaintiffs also allege that Rick
19 Rizzolo "engaged in numerous cash transactions involving millions of dollars in the form of
20 'loans', gambling 'debts' and other third party transactions, all of which were designed to further
21 obscure and conceal the nature, extent and location of his assets." *Id.*, ¶ 18. Defendants deny these
22 allegations and assert that at the time of the Rizzolo's 2005 divorce, the Crazy Horse Too business
23 was worth substantially more than the property received by Lisa Rizzolo. Defendants also argue
24 that proceeds from the forfeiture sale of the Crazy Horse Too would have been sufficient to pay the
25 Henrys' settlement, but for the Government's failure to preserve its business licenses.

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1 Plaintiffs served interrogatories and requests for production of documents on Defendant
2 Rick Rizzolo on October 1, 2008.¹ Mr. Rizzolo, who was represented at that time by the law firm
3 of Patti, Sgro & Lewis, objected to most of Plaintiffs' discovery requests on the grounds that they
4 were irrelevant and not calculated to lead to the discovery of admissible evidence. Mr. Rizzolo
5 served a supplemental response to the requests for production of documents on December 8, 2008
6 in which he restated his objections, but also produced some of his federal income tax returns in
7 response to Request No. 1. He also apparently produced some documents relating to investment
8 accounts in response to Request No. 7 and some documents relating to bank accounts in response
9 to Request No. 23.

10 On December 9, 2008 Plaintiffs filed a motion to compel Mr. Rizzolo to respond to the
11 discovery requests. Prior to the hearing on that motion, Mr. Rizzolo served supplemental answers
12 to interrogatories on December 29, 2008. Mr. Rizzolo again objected to the interrogatories, but
13 provided answers to certain of them. In answer to Interrogatory No. 8, which asked for information
14 regarding his current bank accounts, Mr. Rizzolo stated he had an account at Nevada State Bank
15 which had a balance of \$2,178.06, but which had been seized by the IRS. He stated that no other
16 accounts exist. According to his answer to Interrogatory No. 9, Mr. Rizzolo also produced some
17 documents regarding other bank accounts he had held in the past.

18 Interrogatory No. 12 asked Defendant to list any property he holds or previously held as
19 trustee of a testamentary or inter vivos trust since September 20, 2001, and to identify any trust he
20 created or contributed to for the benefit of others since September 20, 2001. Mr. Rizzolo answered
21 this interrogatory by stating that at one time he and his former wife, Lisa Rizzolo, created a family
22 trust for estate planning purposes. He stated that he was informed that the trust was never funded
23 with assets other than possibly the family home prior the Rizzolo's 2005 divorce. Mr. Rizzolo
24 stated that he was informed and believed that there was no such trust in existence today, i.e. on the
25 date of his answer. Interrogatory No. 17 asked Mr. Rizzolo whether at any time since September
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27 ¹ Copies of Plaintiffs' discovery requests and Defendant Rick Rizzolo's discovery responses
28 were filed as a supplement to Plaintiffs' Renewed Motion to Compel (#279) on March 2, 2010.
See Supplement to Renewed Motion to Compel (#301).

1 20, 2001, he had entered into any transaction with his former spouse or any other relative involving
2 the transfer, conveyance, assignment or other disposition of his real or personal property. Mr.
3 Rizzolo answered this Interrogatory by stating that after the divorce he had no knowledge of what
4 his former wife did with her assets.

5 The undersigned magistrate judge denied Plaintiffs' motion to compel without prejudice on
6 February 3, 2009 based on his doubt whether Plaintiffs had a viable claim under the Nevada
7 Uniform Fraudulent Transfers Act ("UFTA"). The district judge overruled that order on March 23,
8 2009, however, and granted Plaintiffs' motion to compel. *Order (#117)*. On April 20, 2009, Mr.
9 Rizzolo, who was no longer represented by counsel, served a handwritten supplement to his
10 answers to interrogatories and requests for production. In answer to Interrogatory No. 6 which
11 asked Mr. Rizzolo to "list any business you have an ownership interest in," Mr. Rizzolo stated that
12 "I have no interest in any business other than the seized Power Company Inc. Crazy Horse Too and
13 seized RicRiz LLC which owned the shopping center were (sic) Crazy Horse Too is located." In
14 answer to Interrogatory No. 7, which asked Mr. Rizzolo to list all stocks, bonds or other securities
15 that he owned in any company, firm or corporation, he identified himself as a manager of Lions
16 Limited, LLC which owned a Mercedes automobile valued at fifty to sixty thousand dollars. Mr.
17 Rizzolo again supplemented his answer to Interrogatory No. 12 regarding trusts, by stating that he
18 believed there was a family trust formed years ago by attorney John Dawson, but that the trust was
19 never funded. He also stated that he was previously a trustee for his father Bart Rizzolo, but could
20 no longer serve as a trustee because of his felony conviction.

21 In October 2009, Mr. Rizzolo retained attorney Kenneth Frizzell to represent him in this
22 action. On or about January 4, 2010, Mr. Rizzolo served his Second Supplemental Answers to
23 Plaintiffs' Request for Production. In response to Request No. 6, Mr. Rizzolo provided statements
24 for bank accounts for Lions Limited Partnership, and statements for certain investment accounts.
25 On January 4, 2010, Mr. Rizzolo also served his Third Supplemental Answers to Plaintiffs'
26 Interrogatories. Mr. Rizzolo supplemented his previous answers by listing bank accounts and
27 investment accounts which he currently or previously owned, vehicles that he presently or
28 previously owned including a 1955 Corvette automobile that he sold in August 2008, a life

1 insurance policy on his life owned by Lisa Rizzolo, and his retirement/investment accounts.

2 On February 5, 2010, Plaintiffs filed their renewed motion to compel answers to
3 interrogatories and requests for production from Mr. Rizzolo. Mr. Rizzolo served his Third
4 Supplemental Answers to Plaintiffs' Request for Production on February 25, 2010. In this
5 supplement Mr. Rizzolo produced a copy of the registration for the Mercedes vehicle owned by
6 Lions Limited, LLC. He also produced partial statements for his American Express and
7 MasterCard charge accounts. He also provided Plaintiffs with a blanket release form to allow
8 them to obtain any other documents which they believe are relevant. On March 12, 2010, the Court
9 granted Plaintiffs' Renewed Motion to Compel. *Order* (#314). The Court ordered Mr. Rizzolo to
10 provide additional information and produce documents regarding his bank accounts, credit card
11 accounts and investment accounts. *Id.*, pp. 6-8. The Court also ordered Mr. Rizzolo to provide
12 additional information and documents, to the extent they exist, regarding the August 2008 sale of
13 the 1955 Corvette automobile, automobile insurance policies, loans and documents relating to his
14 living arrangements, and allowances provided to his son.

15 In their renewed motion to compel, Plaintiffs also provided information about the "RLR
16 Trust," the existence of which has been established during discovery. This trust had an account at
17 the Capital Security Bank Limited, a foreign bank in the Cook Islands located in the South Pacific.²
18 Plaintiffs further state that in 2008 Mr. Rizzolo deposited \$990,000 into this account from the
19 proceeds of the sale of his interest in a Philadelphia club. *See Motion* (#279), pp. 6, 13. The Court
20 ordered that to the extent that Mr. Rizzolo controls "The RLR Trust," he should be able to obtain
21 trust documents and the trust's bank account statements, and produce them to Plaintiffs. The
22 Court, accordingly, ordered Defendant to supplement his discovery responses by providing a full
23 and complete answer to Interrogatory No. 12, regarding his former or current interest as trustor,
24 trustee or beneficiary in "The RLR Trust" and to provide all documents in his possession, custody
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26 ² Lisa Rizzolo's trust, the LMR Trust, also has an account in this Cook Islands bank.
27 According to Ms. Rizzolo's deposition testimony, she sold most of the securities and investment
28 accounts awarded to her in the 2005 divorce and transferred the proceeds to the LMR Trust's bank
account in the Cook Islands.

1 or control relating to that trust, including a complete copy of its bank account statements.

2 Alternatively, the Court ordered Mr. Rizzolo to provide the Plaintiffs with a complete statement as
3 to why he is unable to produce documents relating to “The RLR Trust,” including its bank account
4 statements. The Court also ordered Mr. Rizzolo to provide full and complete information about his
5 interest in the Philadelphia club or “enterprise” and the \$990,000 he reportedly received in relation
6 to that enterprise. *Order* (#314), pp. 9-10.

7 In their Supplement to the Motion for Sanctions (#404), filed on June 21, 2010, Plaintiffs
8 provided the Court with the depositions of Lisa Rizzolo and the Rizzolos’ estate planning/asset
9 protection attorney, John Dawson, as well as documents relating to the Rizzolos’ trusts and trust
10 account transactions. These depositions and documents show that Mr. Rizzolo, through Lions
11 Limited, LLC, wired \$990,000 to the RLR Trust account at Capital Security Bank in the Cook
12 Islands on or about April 21, 2008. Within a short time after the deposit of the \$990,000 into the
13 RLR Trust account, most of it was paid out. One Hundred Thousand Dollars (\$100,000) was paid
14 to Patti, Sgro & Lewis for attorneys fees. Six Hundred Thousand Dollars (\$600,000) was paid to
15 Lisa Rizzolo’s trust, the LMR trust, for loans that she had authorized and requested to be made to
16 Mr. Rizzolo. Two Hundred Thousand Dollars (\$200,000) was paid to Mr. Rizzolo’s father in
17 repayment of a loan. The remaining balance in the account of \$89,850 was wired to Mr. Dawson’s
18 trust account in July 2008 at Mr. Rizzolo’s request, for purposes of covering his living expenses
19 and paying Mr. Dawson’s attorney’s fees.

20 Mr. Rizzolo served his Supplemental Response in Compliance with Order (#314) on May
21 18, 2010. *See Supplement* (#379). According to this supplement, Mr. Rizzolo provided additional
22 documents in compliance with Order (#314), including documents relating to promissory notes,
23 wire transfers and transactions involving Mr. Rizzolo, the LMR Trust and the RLR Trust. On June
24 4, 2010, Mr. Rizzolo served his Seventh Supplemental Answers to Plaintiff’s Interrogatories (#394)
25 in which he provided statements and other documents concerning his investment interests in Energy
26 Transfer Partners, LP and Primerica. On June 14, 2010, Mr. Rizzolo served his Eighth Supplement
27 in Continued Compliance with Order #314 (#398). He attached to this supplement a letter from
28 Primerica regarding the time it would take to provide complete statements for the Primerica

1 account. On June 25, 2010, Mr. Rizzolo served his Ninth Supplement in Continued Compliance
 2 with Order #314 (#406), which attached a print-out history for the Primerica account. It does not
 3 appear, however, that Mr. Rizzolo complied with this Court's March 12, 2010 order that he produce
 4 a complete copy of the RLR Trust's bank account statements. *See Order (#314)*, p. 10.

5 DISCUSSION

6 In their Motion for Rule 37(b) Sanctions (#371), Plaintiffs ask the Court to enter a default
 7 judgment against Defendant Rick Rizzolo based on his willful violation of Order (#314). Although
 8 Plaintiffs assert that Mr. Rizzolo generally failed to comply with the order in regard to documents
 9 or information relating to his bank accounts, credit card accounts and investment accounts, the
 10 primary focus of the motion was Mr. Rizzolo's alleged failure to produce documents or information
 11 regarding the RLR Trust and other trusts. As set forth above, subsequent to the filing of the motion
 12 for sanctions, Mr. Rizzolo, through his counsel, provided additional documents in compliance with
 13 the Court's order on a rolling basis. This included providing some documents relating to the RLR
 14 trust and apparently relating to the the proceeds that Mr. Rizzolo received in or about April 2008
 15 from the sale of his interest in a topless nightclub in Philadelphia, Pa. It does not appear, however,
 16 that Defendant Rizzolo has produced the bank statements from the RLR Trust bank account in
 17 Capital Security Bank Limited located in the Cook Islands.

18 Fed.R.Civ.Pro. 37(b)(2) provides that if a party fails to obey an order to provide or permit
 19 discovery, the court may make such orders in regard to the failure as are just. The rule includes a
 20 list of sanctions that the court may impose, including the severe sanctions of dismissing the action
 21 or entering a default judgment. In regard to the imposition of severe sanctions, *Henry v. Gill*
 22 *Industries*, 983 F.2d 943, 948 (9th Cir. 1993) states:

23 "Because the sanction of dismissal is such a harsh penalty, the district
 24 court must weigh five factors before imposing dismissal: (1) the
 25 public's interest in expeditious resolution of litigation; (2) the court's
 26 need to manage its dockets; (3) the risk of prejudice to the party
 27 seeking sanctions; (4) the public policy favoring disposition of cases
 28 on their merits; and (5) the availability of less drastic sanctions."
Porter v. Martinez, 941 F.2d 732, 733 (9th Cir. 1991) (citations and
 internal punctuation omitted).

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1 The key factors are prejudice and the availability of lesser sanctions. *Henry*, 983 F.2d at
 2 948, *citing Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990). For dismissal or default to be
 3 proper, the conduct to be sanctioned must also be due to willfulness, fault or bad faith by the losing
 4 party. Disobedient conduct not shown to be outside the control of the litigant is all that is required
 5 to demonstrate willfulness, bad faith or fault. *Henry*, 983 F.2d at 947-48, *citing Fjelstad v.*
 6 *American Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985). In deciding whether dismissal or
 7 default is warranted, the court may consider all of the offending party's discovery conduct. *Henry*,
 8 983 F.2d at 947, *citing Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1411 (9th Cir. 1990).

9 The requesting party suffers prejudice if the responding party's discovery violations impair
 10 the requesting party's ability to go to trial or threaten the rightful decision of the case. *Henry*, 983
 11 F.2d at 948. *Anheuser-Busch, Inc. v. Natural Beverage Distributors, Inc.*, 69 F.3d 337, 348 (9th
 12 Cir. 1995), states that the severe sanction of dismissal is warranted where a party has engaged
 13 deliberately in deceptive practices that undermine the integrity of judicial proceedings. In that case,
 14 the court held that plaintiff was prejudiced by defendant's failure to produce the documents because
 15 it was forced to rely on incomplete and spotty evidence in presenting its defense to the
 16 counterclaim. *Anheuser-Busch, Inc.*, 69 F.3d at 353-354. The court also rejected defendant's
 17 argument that plaintiff was not prejudiced because the documents were produced two months
 18 before the scheduled commencement of trial. The court noted that it has "squarely rejected the
 19 notion that a failure to comply with the rules of discovery is purged by belated compliance."
 20 The Ninth Circuit summed up the basis for imposing severe sanctions in *Valley Engineers Inc. v.*
 21 *Electric Engineering Company*, 158 F.3d 1051, 1057-58 (9th Cir. 1998) as follows:

22 What is most critical for case-dispositive sanctions, regarding risk of
 23 prejudice and of less drastic sanctions, is whether the discovery
 24 violations "threaten to interfere with the rightful decision of the case."
 25 *Adriana*, 913 F.2d at 1412. While contumaciousness toward the court
 26 needs a remedy, something other than case-dispositive sanctions will
 27 often suffice. Dismissal is appropriate where a "pattern of deception
 28 and discovery abuse made it impossible" for the district court to
 29 conduct a trial "with any reasonable assurance that the truth would be
 30 available." *Id.*, at 1057-58, *citing Anheuser-Busch, Inc.*, 69 F.3d at
 31 352.

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1 Defendant Rick Rizzolo's discovery responses in December 2008 and April 2009 regarding
2 his interests in testamentary or inter vivos trusts were clearly deceptive. At the time of these
3 responses, Mr. Rizzolo must have known of the existence of the RLR Trust and that he had
4 transferred \$990,000 into the RLR Trust's bank account in April 2008, which shortly thereafter was
5 withdrawn at his request to pay his attorneys fees, to repay loans from Lisa Rizzolo and her trust, to
6 repay a loan from his father, and to cover Mr. Rizzolo's living expenses. Rule 37(b) does not
7 authorize entry of a default judgment solely because a party has given false or deceptive answers to
8 interrogatories.³ The rule, instead, authorizes the imposition of severe sanctions where the party's
9 violation of discovery orders prejudices the opposing party's ability to proceed to trial and threatens
10 the rightful decision of the case.

11 In this case, Mr. Rizzolo, through his counsel Mr. Frizzell, began supplementing his
12 previous discovery responses even before the Court entered its second order to compel on March
13 12, 2010. Following the entry of that order, Defendant engaged in an ongoing supplementation of
14 his discovery responses which continued after Plaintiffs filed their motion for sanctions on May 11,
15 2010. While Defendant Rizzolo's supplementation of his discovery responses is not altogether
16 sufficient, his conduct does not demonstrate the type of willful disobedience of the court's orders
17 that justifies entering a default judgment against him. Stated otherwise, the Court is not persuaded
18 that the deficiencies in Defendant's compliance with the discovery orders in this case make it
19 impossible to conduct a trial with any reasonable assurance that the truth will be available.

20 Nor is the Court persuaded that Mr. Rizzolo's failure to comply with his discovery
21 obligations makes it impossible for Plaintiffs' counsel to adequately depose Mr. Rizzolo. Requiring
22 Mr. Rizzolo to answer questions under oath at deposition regarding the disposition of his assets
23 since September 2001, including previously undisclosed business and trust transactions, and loans
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26 ³ The fact that a party has provided false answers under oath may, of course, be used to be
27 impeach his testimony at trial and may support a finding against the party on the issues to which the
28 false answer is relevant. In this case, for example, the trier of fact may conclude that Mr. Rizzolo's
false or deceptive answers to interrogatories demonstrate an ongoing intent to conceal his assets or
the disposition of those assets.

1 or other transactions between he and his ex-wife, may establish the necessary elements for
2 Plaintiffs' conspiracy and fraudulent transfer claims against the Defendants. Mr. Rizzolo's
3 testimony may also lead to the discovery and seizure of his assets. The Court will not assume that a
4 deposition of Mr. Rizzolo will be substantially unavailing in either respect. Mr. Rizzolo may also
5 be subject to a follow-up deposition, if necessary, in regard to additional records that are discovered
6 as a result of his initial deposition. Finally, the threat of more severe sanctions should impress upon
7 Mr. Rizzolo the need for him to be completely truthful during his deposition.

8 Plaintiffs are, however, entitled to the statements for the RLR Trust Account at the Capital
9 Security Bank in the Cook Islands. Notwithstanding his compliance with the Court's March 12,
10 2010 order in other respects, Mr. Rizzolo has still not complied with that portion of the order that
11 required him to produce those statements. An award of attorneys fees against Mr. Rizzolo for
12 failure to comply with this portion of the Court's March 12, 2010 order is therefore justified.

13 Accordingly,

14 **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Rule 37(b) Sanctions for
15 Defendant Rick Rizzolo's Failure to Comply With Order (#371) is **denied**, in part, and **granted**, in
16 part, as follows:

17 1. Plaintiffs' request that a default judgment be entered against Defendant Rick Rizzolo
18 pursuant to Fed.R.Civ.Pro. 37 (b) is denied, without prejudice.

19 2. Defendant Rick Rizzolo shall produce to Plaintiffs complete bank statements for the
20 RLR Trust Account at the Capital Security Bank in the Cook Islands, or any other financial
21 institution account for that trust, from the date of the inception of such account(s) up to the present
22 or through the date that the bank account(s) was closed. Defendant is further directed to take
23 immediate action to request and/or direct the trustees of the the RLR Trust to produce the account
24 statements. Unless extended by stipulation of the parties or court order, such statements shall be
25 produced to Plaintiffs on or before **August 25, 2010**.

26 3. Defendant Rick Rizzolo is ordered to pay \$1,000.00 to Plaintiffs, as and for
27 reasonable attorneys fees on the motion for sanctions, based on his failure to comply with the
28 Court's order requiring him to produce a complete copy of the RLR Trust's bank account

1 statements. Continued failure to comply with this portion of the Court's order will result in
2 imposition of more severe sanctions, which could include granting Plaintiffs' request for entry of a
3 default judgment.

4 **IT IS FURTHER ORDERED** that the discovery deadline in this case is extended until
5 **October 8, 2010** for purposes of permitting Plaintiffs to take Mr. Rizzolo's deposition.

6 DATED this 10th day of August, 2010.

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10 GEORGE FOLEY, JR.
11 U.S. MAGISTRATE JUDGE
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